
(1941) 03 PAT CK 0018
In the Patna High Court

Raja Jagdish Chandra Deo Dhabal Deb APPELLANT
Vs
Rai Pada Dhal and Others RESPONDENT

Date of Decision : 18-03-1941

Acts Referred:

Succession Act, 1925 — Section 105, 109

Citation : AIR 1941 Patna 458

Hon'ble Judges : Agarwala, J

Bench : Division Bench

Judgement

Agarwala, J.—By a will dated 11th May 1905, the late proprietor of the Dalbhum Estate made a bequest of his properties and appointed the present Raja as the executor of the will. The latter applied for and obtained probate. The will provided inter alia that the executor should pay Rs. 135 a month to Haradhan Dhal, a son born of his kept wife "putra poutradhi purush uttaradhikramey". Haradhan Dhal predeceased the testator leaving a son Kali Prasanna Dhal. The opposite party obtained a decree against Kali Prasanna Dhal and in the execution proceedings impleaded the executor of the will of the late Raja of Dalbhum as garnishee and sought to attach a sum of Rs. 88-12-3 out of the annuity which he claims is payable to the judgment-debtor. The garnishee objected denying that the judgment-debtor was entitled to an annuity. The trial Court held that the decree-holder was entitled to attach the money which he sought to attach.

2. The question for decision is whether the legacy lapsed by reason of the provisions of Section 105, Succession Act. The point appears to be covered by the decision of this Court in Saroda Prasad Ghosh and Another Vs. Debendra Nath Ghosh and Others, . There by the terms of the will an annuity was payable to "A putra poutradi krame" but was not charged to any property. A predeceased the testator. It was held that the will conferred the estate of inheritance upon A; but as A had predeceased the testator the legacy lapsed.

3. In the course of the judgment the learned Judges observed that the principle of law is that an annuity is a perpetual one only in those cases where there is a

charge on specific property in which circumstances the law assumes that it is not an annuity alone but the property itself that has been bequeathed. It is contended on behalf of the decree-holder that as in the present case the annuity is directed to be paid out of the estate a charge has been created. The charge, however, is not on any specified property, and it is certainly not the case of anybody in the present litigation that the entire Dalbhum estate was bequeathed to the late Raja's illegitimate son.

4. It was next contended that Kali Prasanna Dhal, the judgment-debtor, takes the legacy by reason of the provisions of Section 109, Succession Act. That section provides:

Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

5. It is contended that the phrase "any child or other lineal descendant" includes an illegitimate son. It is well established by authority that illegitimate children are not included in the term "child" in a will, deed or other document unless some repugnancy or inconsistency would result from their exclusion.

6. In *Swaine v. Kennerly* (1813) 1 V & B 469 Eldon L.C. said: "The will itself must prove that illegitimate children are included." The general rule is that an illegitimate child is included in the term "child" only when there is a *designatio persona*: *Beachcroft v. Beachcroft* (1816) 1 Mad 430.

7. In the present case while the terms of the will shew that the testator intended to provide for his illegitimate son, it does not go further than that, or shew that he intended to provide for the descendants of his illegitimate son. The phrase "putra poutradhi purush uttaradhikramey" is merely descriptive of the estate which the testator proposed to confer on Haradhan Dhal and it does not import a gift over to the sons and grandsons of the latter.

8. I would therefore set aside the decision of the learned Munsif and dismiss the decree-holder's claim to attach the money in dispute. It may be mentioned that the decree in execution is a decree of the Small Cause Court and is being executed in that Court. The garnishee preferred an appeal against the decision of the Small Cause Court dismissing his objection to the Subordinate Judge as a result of wrong legal advice given to him with regard to proper construction of the new Rule 63H of Order 21. That rule however does not confer a right of appeal in garnishee matters in cases where no appeal ordinarily lies. The remedy of the garnishee was, therefore, not by way of appeal to the Subordinate Judge but by a motion to this Court.

9. The learned Subordinate Judge rightly held, therefore, that no appeal lay to him against the order of the Small Cause Court Judge.